

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pasadena Neighborhood Coalition,

Complainant,

vs.

Altrio Communications, Inc.,

Defendant.

Case 02-11-053
(Filed November 19, 2002)

Anita Taff-Rice, Bowen Law Group, L.L.P., for
Pasadena Neighborhood Coalition, complainant.
Peter A. Casciato, Attorney at Law, for Altrio
Communications, Inc., defendant.

OPINION RESOLVING COMPLAINT

1. Summary

Defendant Altrio Communications, Inc. (Altrio), U-6556-C, has violated the terms of the Limited Facilities-Based Certificate of Public Convenience and Necessity (LFB CPCN) that we granted in Decision (D.) 01-07-022. Altrio may not provide telephone service over its Open Video System (OVS) network beyond its initial Pasadena hub unless it has obtained a full facilities-based CPCN. This proceeding is closed.

2. Statement of Facts

2.1. D.01-07-022

On October 20, 2000, Altrio applied for a CPCN to provide (1) competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and (2) nondominant interexchange carrier (NDIEC) services throughout the state (Application (A.) 00-10-044). On May 10, 2001, Altrio amended its application, asking that we consider its application in two steps. First, Altrio requested that the Commission immediately grant it limited facilities-based (LFB) and resale authority to operate as a competitive local carrier (CLC) within the greater Los Angeles metropolitan area, and as an NDIEC statewide. Altrio's amended application requested that the LFB CPCN include authority to construct various facilities in the Los Angeles area. This construction included what Altrio characterized as three components:

1. Pulling fiber-optic and coaxial cable through existing utility conduit, attaching fiber-optic and coaxial cable to existing utility poles, and installing distribution nodes and optical-electrical interfaces;
2. Installing backup electric generators within existing utility easements; and
3. Installing approximately 1.2 miles of new utility conduit within existing rights-of-way.

Second, Altrio would at a later time file a Proponent's Environmental Assessment (PEA) and ask us to grant it full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and as an NDIEC statewide.

On July 16, 2001, we issued D.01-07-022, which granted Altrio an LFB CPCN to provide competitive local exchange telecommunications services utilizing resale of other carriers' services or unbundled network elements and equipment installed solely within existing buildings or structures. We concluded that the construction activities identified by Altrio in its amended application could not be included in its LFB CPCN. We deferred consideration of the three components to a later decision, leaving the docket open for further consideration after Altrio submitted its PEA. Under the terms of the LFB CPCN, we prohibited Altrio from constructing buildings, towers, conduits, poles, or trenches, as well as the facilities Altrio identified in the three components.¹

2.2. Altrio's OVS Network

2.2.1. Authorization

On November 9, 2000, Altrio was certified by the Federal Communications Commission (FCC) to operate an OVS in Los Angeles, Ventura, and Orange counties.² Altrio's network is not only a cable television system. It is a broadband service capable of delivering cable video, cable modem, and telephone services simultaneously; the individual subscriber chooses which service, or combination of services, to receive.

On December 6, 2000, Altrio filed an application for a franchise to operate as an OVS provider in the City of Pasadena (City). Altrio

¹ Whether we intended to prohibit Altrio from pulling cable through existing utility conduit has been a subject of some controversy in this proceeding. In view of our disposition of this case, it is unnecessary to resolve that question.

² OVS is similar to cable television, but most of the channel capacity on an OVS must be made available to unaffiliated video programming providers.

proposed to provide its services primarily to residential customers in the City. On February 8, 2001, Altrio provided written responses to supplemental questions asked by the City about its application.

The City considered Altrio's application at a City Council meeting on August 13, 2001. At that meeting, an attorney serving as outside counsel for the City orally advised the City Council that the City's action in entering into a franchise agreement with Altrio was exempt from the requirements of the California Environmental Quality Act (CEQA), Pub. Res. Code §§ 21000 *et seq.* The City Council adopted Ordinance 6873 on August 20, 2001, authorizing the agreement with Altrio. On August 21, 2001, the City executed "An agreement between the City of Pasadena and Altrio Communications Inc. granting nonexclusive rights to construct and to operate an open video system in the City of Pasadena and setting forth terms and conditions relating to the exercise of those rights" (OVS Agreement). The OVS Agreement is the subject of litigation filed in November 2002, challenging the City's actions on several grounds. In compliance with a ruling of the Administrative Law Judge (ALJ), Altrio filed in this proceeding a copy of the verified petition for writ of mandate in *Kneisel v. City of Pasadena*, No. BS079863 (Los Angeles Superior Court). We take official notice of the pendency of this litigation, pursuant to Rule 73 of the Commission's Rules of Practice and Procedure.³

³ Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

2.2.2. Construction

Altrio began construction of the OVS network in October 2001. The network extends from Altrio's offices and headend in Los Angeles, near the City of Glendale, to Altrio's hub and node facilities in Pasadena, and then to the individual subscriber's residence.⁴ From its headend, Altrio has pulled both fiber-optic cable and coaxial cable through existing utility conduits within the office park where Altrio's offices are located. It has attached fiber cable to existing utility poles between its headend and the first of two planned hubs in Pasadena. Each hub serves homes within a six-mile radius of the location of the hub. Altrio has completed a hub in the northern part of Pasadena and intends to add one hub and the distribution network running from it to subscribers' homes in the southern part of the City.⁵

From the hub, Altrio's fiber cable, both strung on existing utility poles and put underground, runs to Altrio's distribution nodes, which contain optical/electrical interfaces. Associated with each node is a cabinet containing a battery and a small generator powered by natural gas from gas utility lines, used as backup power sources. Altrio has put in place approximately 46 nodes and associated cabinets connected to its hub in the northern part of Pasadena, out of approximately 120 that it has planned for the City. From the nodes, coaxial cable hung on existing utility poles runs to taps on

⁴ Altrio is providing service only in Pasadena at this time. The PEA identified possible areas for additional service as Burbank, Glendale, Arcadia, Monrovia, Sierra Madre, La Canada/Flintridge, portions of the City of Los Angeles, and the Altadena area of Los Angeles County.

⁵ The hub in southern Pasadena is under construction.

the poles. From the taps, coaxial cable is “dropped” to the individual customer’s residence.

2.2.3. Services Provided

As noted earlier, Altrio’s OVS is a broadband network that offers its customers cable television, high-speed cable modem, and telephone services. Once at the customer’s residence, the signals carried over Altrio’s cables are separated to feed the devices that are specific to each service. Cable television service may go directly to the television, but often requires the installation of a set-top box. High-speed modem service requires the connection of a cable modem to the customer’s computer. Telephone service requires the connection of a network interface device (NID), typically installed on an outside wall of the customer’s house, which both carries the telephone signals to in-home wiring and powers the ringing of the customer’s telephone.⁶

Altrio offers each of these three services to its customers. A customer may subscribe to any one service, or any combination of services. Fewer than 2% of Altrio’s customers subscribe to telephone service only. Altrio believes that almost all of those customers initially subscribed to cable video and/or cable modem in addition to telephone, but later dropped the other services.

⁶ Although the NID may be used for other functions, its only current function in Altrio’s OVS network is enabling telephone service.

3. Discussion

3.1. The Disputed Construction

In this complaint, the Pasadena Neighborhood Coalition (Coalition) claimed that Altrio has violated its LFB CPCN by constructing a variety of facilities in Pasadena in order to provide its OVS network services. These facilities include utility cabinets containing small batteries and gas-powered backup generators, as well as the associated distribution nodes; cable hanging from existing utility poles; and new underground conduits for Altrio's cables.

Altrio concedes that it has engaged in this construction and that it will undertake additional construction in Pasadena. It asserts as its sole defense that the construction is validly authorized by Altrio's OVS Agreement with the City and was properly found by the City to be exempt from CEQA. Altrio contends that since the OVS Agreement authorizes construction of the OVS network, there is no role for further Commission review related to provision of telephone services. In Altrio's view, the OVS Agreement provides all the authority it needs to build and run the OVS network, offering the full range of services (cable television, cable modem for data, and telephone) over the network.

3.2. Requirements of the LFB CPCN

The LFB CPCN that we granted in D.01-07-022 governs the conditions on which Altrio can provide the telephone services we authorized. We did not authorize Altrio to use any facilities or equipment other than existing facilities and equipment installed in existing buildings or structures. We stated that "Altrio shall be prohibited from engaging in any construction of buildings,

towers, conduits, poles, or trenches or the construction of facilities identified in Components 1 through 3.” (D.01-07-022, *mimeo.*, at p. 6.)⁷ We found that “[a] PEA must be filed before the Commission can consider the expanded facilities-based authority requested by Altrio” (D.01-07-022, *mimeo.*, at p. 9.)

Altrio is providing telephone service to customers in Pasadena using facilities that it has built outside of existing structures, including distribution nodes, backup power supplies in new utility cabinets, and cable hanging from existing utility poles. The LFB CPCN does not allow this. Altrio’s claim that its OVS network, as now built, has become an “existing structure,” and that it is thus in compliance with its LFB CPCN in offering telephone service through the OVS, is unsupportable. Altrio applied to the Commission for permission to offer telephone service by building exactly what it has built for its OVS network. We did not grant that permission. Altrio did not ask us to modify D.01-07-022 after it entered into the OVS Agreement with the City. Having then built its OVS, Altrio cannot now say that the construction of the OVS network has rendered the limits of the LFB CPCN irrelevant. We do not need to decide, and leave to the courts, whether the City properly authorized Altrio to undertake that construction and properly found it exempt from CEQA, as well as whether Altrio violated other requirements, not addressed in this decision, in constructing its OVS network in Pasadena.

The Coalition contends that Altrio’s construction in its entirety is barred by D.01-07-022. Because the design and components of the OVS network are dictated by the need to maintain highly reliable telephone service, the

⁷ Components 1 through 3 are discussed in Section 2.1 of this Opinion.

Coalition asserts, Altrio's construction activities require our review of Altrio's PEA.

As the complainant in this proceeding, the Coalition has the burden of proving, by a preponderance of the evidence, its contentions of violation. (See, *e.g.*, D.02-01-049 (January 15, 2002).) The Coalition's evidence was directed to Altrio's backup power supplies, which the Coalition asserts have very large power capacity solely in order to provide reliable telephone service in the event of a commercial power outage. David Large, Altrio's Senior Vice President, Engineering and Chief Technical Officer, testified that Altrio chose to use off-the-shelf 5-kilowatt gas-powered generators as its backup power sources both in order to provide greater reliability for its current network than its competitors provided for their systems, and to allow for expansion and further development of the OVS network in the future. The Coalition attempted to show that the backup power requirements were really for Altrio's current telephone service needs. This effort fails because the Coalition's interpretation of the evidence depends on assumptions about the number of homes using Altrio's telephone service and the power needs for that service that are not supported by the evidence in the record.⁸ Without the aid of those assumptions, the Coalition cannot make the showing required to meet its burden of proof. Consequently, we cannot conclude that Altrio's design and construction activity, in itself, violates D.01-07-022.

⁸ In its Response of Altrio Communications, Inc. to Appeal of the Presiding Officer's Decision (POD) by the Pasadena Neighborhood Coalition (October 14, 2003), Altrio makes different assumptions on these issues, likewise not supported by the evidence in the record.

In sum, even assuming that Altrio's OVS Agreement with the City authorizes Altrio to undertake the construction of its OVS network in Pasadena, the OVS Agreement cannot authorize Altrio to provide telephone service on any terms other than those set out in D.01-07-022. By providing telephone service in the City that uses facilities that were excluded from its authority in the LFB CPCN, Altrio has violated and is violating the terms of the LFB CPCN granted in D.01-07-022.

3.3. Remedy

Altrio is now and has been providing telephone service in violation of the terms of its LFB CPCN. Altrio must begin operating within the limited authority conferred by D.01-07-022. However, requiring Altrio now to cease providing telephone service to its current customers in Pasadena would create hardship for the customers, who are not implicated in Altrio's violation of D.01-07-022 and are relying on Altrio's provision of telephone service. We will instead require that, effective immediately, Altrio may not provide telephone service to any customers not served by its initial Pasadena hub, as part of its OVS network services in Pasadena.⁹

The Coalition urges the more dramatic remedy of a stop work order on the construction of Altrio's OVS network. As explained above, however, the Coalition has failed to show that Altrio's design and construction activity, in itself, violates D.01-07-022. We therefore focus on Altrio's provision of telephone

⁹ The complaint in this proceeding addresses Altrio's activities in Pasadena; our order is therefore confined to Altrio's services in that city. A similar analysis and similar results would apply, however, in any locality in which Altrio sought to provide telephone service over facilities prohibited to it by D.01-07-022, in the absence of a full facilities-based CPCN.

service and restrict it to the terms of the LFB CPCN. These restrictions will remain in effect unless Altrio obtains a full facilities-based CPCN. As the Coalition's complaint does not ask the Commission to impose a monetary sanction on Altrio, we will not consider such a sanction in this proceeding.

4. Appeals

The POD was mailed August 28, 2003. Altrio and the Coalition each filed timely appeals on September 29, 2003, and timely responses to the other's appeal on October 14, 2003.

Altrio's appeal asserts that it is in compliance with the LFB CPCN because, in offering telephone service over its OVS network, it is utilizing an existing structure (the OVS network) for its telephone service. As we explained in Section 3.2, above, this assertion ignores the fact that in the LFB CPCN we expressly declined to authorize the provision of telephone service over Altrio's OVS network if new construction were in any way required. Altrio concedes that it has undertaken new construction to build its OVS network; it cannot then escape the conclusion that the LFB CPCN does not allow it to provide telephone service over the newly-built network.

The Coalition's appeal claims that it did carry its burden of proving that the backup power requirements of Altrio's OVS network were necessitated by Altrio's provision of telephone service. As discussed in Section 3.2, above, the Coalition's view of the evidence on this issue is based on assumptions that are not supported by the record, and thus cannot satisfy the proof requirements.

We adhere to the analysis in the POD. The Coalition has not shown us that the POD misinterpreted the evidence related to backup power requirements for the OVS network. We have expanded our discussion of the issue of power requirements for Altrio's OVS network to clarify our conclusion that the

Coalition did not meet its burden of proof. Altrio has not persuaded us that the LFB CPCN allowed it to construct its OVS network and then provide telephone service over that network without a full facilities-based CPCN. We have clarified the physical basis for our remedial order, focusing it on the planned elements of Altrio's OVS network that will expand its scope in Pasadena; to this end, we have added a new Finding of Fact 9, revised Conclusion of Law 3, revised Ordering Paragraph 1, and eliminated Ordering Paragraph 2. We reject the Coalition's untimely request for the imposition of monetary sanctions. We note, however, that a finding of violation of our rules or orders is generally accompanied by a fine. In this case, in which we find that a clear violation of D.01-07-022 occurred, a request by the Coalition that we impose a penalty on Altrio might well have resulted in a decision that included a fine.

5. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Anne E. Simon is the assigned ALJ in this proceeding.

Findings of Fact

1. Altrio was certified by the FCC to operate an OVS in Los Angeles, Ventura, and Orange counties on November 9, 2000.
2. Altrio applied for a CPCN on October 20, 2000, to provide competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and NDIEC services throughout the state (A.00-10-044).
3. Altrio amended its application on May 10, 2001, to request the immediate grant of limited facilities-based and resale authority to operate as a CLC within the greater Los Angeles metropolitan area, and as an NDIEC statewide.

4. In its amended application, Altrio proposed that at a later time it would file a PEA and ask us to grant it full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers and as an NDIEC statewide.

5. D.01-07-022 granted Altrio an LFB CPCN to provide competitive local exchange telecommunications services utilizing resale of other carrier's services or unbundled network elements and equipment installed solely within existing buildings or structures.

6. D.01-07-022 required Altrio to file a PEA before the Commission would consider granting authority for Altrio to construct new facilities.

7. On August 21, 2001, Altrio and the City of Pasadena entered into the OVS Agreement, granting nonexclusive rights to construct and to operate an OVS.

8. Altrio's OVS network to serve the City requires extensive construction, including pulling both fiber-optic cable and coaxial cable through existing utility conduits, attaching both fiber and coaxial cable to existing utility poles, installing distribution nodes containing optical/electrical interfaces, and installing cabinets containing both batteries and natural gas backup generators.

9. Altrio has constructed one hub for its distribution system in the City and is beginning construction of an additional hub and associated distribution system to serve additional areas.

10. Altrio is now offering cable television, cable modem, and telephone services to customers in Pasadena through its OVS network.

11. The interests of current Altrio customers would be harmed if Altrio were required to cease providing telephone services to them.

Conclusions of Law

1. Altrio has authority to provide telephone services in accordance with the terms of D.01-07-022.
2. Altrio is currently providing telephone service over its OVS network in Pasadena in violation of the limited facilities-based authority provided in D.01-07-022.
3. In order to bring Altrio into compliance with its LFB CPCN without causing hardship to current customers, Altrio should not provide telephone service to any customers not served through its initial Pasadena hub, unless it has obtained a full facilities-based CPCN.
4. This order should be effective immediately, in order to prevent further violations of D.01-07-022.

O R D E R

IT IS ORDERED that:

1. Altrio Communications, Inc. (Altrio) may not provide telephone service via its Open Video System network to any customer who was not receiving telephone service from Altrio on the date of this order unless it has obtained a full facilities-based Certificate of Public Convenience and Necessity covering the area where it intends to provide telephone service.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.